

1 THE HONORABLE THOMAS S. ZILLY  
2  
3  
4  
5  
6  
7  
8

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 BUNGIE, INC.,

10 Plaintiff,

11 v.

12 AIMJUNKIES.COM; PHOENIX DIGITAL  
13 GROUP, LLC; DAVID SCHAEFER; JORDAN  
14 GREEN; JEFFREY CONWAY; and JAMES  
15 MAY,

Defendants.

No. 2:21-cv-00811

**PLAINTIFF BUNGIE, INC.'S  
MOTION FOR  
RECONSIDERATION**

NOTE ON MOTION CALENDAR  
November 16, 2023

BUNGIE, INC.'S MOTION  
FOR RECONSIDERATION  
(No. 2:21-cv-00811)

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: +1.206.359.8000  
Fax: +1.206.359.9000

## I. INTRODUCTION

In its Minute Order concerning Plaintiff and Defendants' Motions in *Limine* (the "Order") (Dkt. No. 241), this Court entered the following two orders relevant to this motion:

1.2. Plaintiff's motion to instruct the jury that the Arbitration Award's finding that Defendant May developed the Cheat Software sold on AimJunkies.com while working with and for the benefit of the other Defendants, is true is DENIED. The Arbitrator did not make this precise finding.

1.3. Plaintiff's motion to instruct the jury that the Arbitration Award's finding that to operate, the Cheat Software necessarily creates (a) unauthorized copies of the Destiny 2 and Destiny 2: Beyond Light code and (b) unauthorized derivative works of Destiny 2 and Destiny 2: Beyond Light, is true is DENIED. Any such finding was not necessary to the Arbitrator's Final Award

Pursuant to Local Civil Rule 7(h)(1), Plaintiff Bungie, Inc. (“Bungie”) respectfully moves the Court to reconsider paragraphs 1.2 and 1.3 of its Order. Bungie moves for reconsideration on the grounds that paragraphs 1.2 and 1.3 are contrary to the plain text of Judge Ronald Cox’s (Ret.) Final Award (Dkt. No. 89-1) and thus constitutes manifest error.

As to paragraph 1.2, Judge Cox found specifically and repeatedly that (a) James May developed the Cheat Software, (b) that the Cheat Software was sold on the AimJunkies.com website, and (c) May acted in concert with and for the benefit of the remaining Defendants.

As to paragraph 1.3, Judge Cox's finding that the Cheat Software necessarily creates unauthorized copies of *Destiny 2* and unauthorized derivative works was necessary to Judge Cox's ruling. Judge Cox needed to find that Defendants trafficked in technology that circumvents Bungie's measures **that protect a right of Bungie under copyright law**. Judge Cox found that the Cheat Software circumvents these measures **because** the Cheat Software produces a result that infringes Bungie's rights under copyright law to copy and create derivative works based on *Destiny*.

BUNGIE, INC.'S MOTION  
FOR RECONSIDERATION - 1  
(No. 2:21-cv-00811)

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: +1.206.359.8000  
Fax: +1.206.359.9000

## II. DISCUSSION

#### A. Legal Standard

To succeed on a motion for reconsideration, the moving party must show manifest error in the prior ruling. *United Nat. Foods, Inc. v. Int'l Bhd. of Teamsters*, Loc. 117 & Loc. 313, No. 2:19-CV-01736-RAJ, 2020 WL 6709634, at \*1 (W.D. Wash. Nov. 16, 2020) (quoting Local Rules W.D. Wash. LCR 7(h)(1)); Local Rules W.D. Wash. LCR 7(h)(1); *see also Miller v. Lehman*, No. C04-0671C, 2005 WL 8166021, at \*1 (W.D. Wash. May 20, 2005) (granting motion for reconsideration in the case of manifest error in a prior ruling).

In the Final Award, Judge Cox made numerous findings relevant to Defendants' liability on Bungie's remaining federal claim for copyright infringement. As previously held by this Court, Judge Cox's findings are binding on these proceedings provided that (1) the issue at stake [was] identical to the one alleged in the prior litigation; (2) the issue [was] actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation [was] a critical and necessary part of the judgment in the earlier action. Dkt. No. 201 (*citing Spivak v. Alphabet Inc.*, No. C20-1480, 2021 WL 535211, at \*7 (W.D. Wash. Feb. 12, 2021)); *see also NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019).

**B. May developed the Cheat Software sold on AimJunkies.com while working with and for the benefit of the other Defendants.**

In its Order, the Court denied Bungie’s request to instruct the jury that “May developed the Cheat Software sold on AimJunkies.com while working with and for the benefit of the other Defendants,” explaining that in its view, “the Arbitrator did not make this precise finding.” Dkt. No. 241 at 1. But the plain language of the Final Award is clear, and Judge Cox did make such a finding—and in fact, did so repeatedly.

*First*, the Final Award was clear that May “developed the Cheat Software sold on AimJunkies.com.” Specifically, Judge Cox found that: “May testified that on many occasions, he connected reverse engineering tools to the *Destiny 2* process in order to reverse engineer it and

1 **develop a cheat for the game.”** Final Award at 11. By “the game,” Judge Cox was clearly  
 2 referring back to *Destiny 2*, which is the preceding subject. *Id.* He made this even more clear on  
 3 the next page stating: “May reverse engineered *Destiny 2* in order to help develop a cheat for  
 4 *Destiny 2* that Phoenix [Digital] sold on its website.” *Id.* at 12 (emphasis added). Judge Cox found  
 5 that May developed a *Destiny 2* cheat that Phoenix Digital sold on its website.

6 There was also only one *Destiny 2* cheat at issue in the arbitration, which is the same one  
 7 at issue here. And Defendants only sold one *Destiny 2* cheat. So the *Destiny 2* cheat that May  
 8 developed and was sold by Phoenix Digital is *necessarily* the same one at issue here. Judge Cox  
 9 clearly so found:

10 One of the terms of the LSLA prohibited a licensee from reverse  
 11 engineering of Destiny 2. Nevertheless, this is exactly what May did  
 12 a number of times. **This activity allowed Phoenix to modify and**  
**sell through its website, Aimjunkies.com, a beta version of a**  
**cheat for Destiny 2.** The beta version of the cheat was followed by  
 13 revisions that included "ESP" and then the full Destiny 2 cheat. Over  
 14 the course of, at least, the next year, May engaged in the  
 15 unauthorized access of Destiny 2 many times. Phoenix sales of **these**  
**various versions of the cheat** continued throughout this period as  
 well.

16 Final Award at 6-7, ¶ 12 (emphasis added).

17 In other words, the same cheat that May developed and sold through Aimjunkies.com was  
 18 at issue in the arbitration and is at issue here. That’s the first part of the requested instruction.

19 **Second,** the Final Award was clear that May developed the cheat “while working with and  
 20 for the benefit of the other Defendants.” Specifically, Judge Cox held that “May testified that on  
 21 many occasions, he connected reverse engineering tools to the *Destiny 2* process in order to reverse  
 22 engineer it and develop a cheat for the game.” Final Award at 11. In the **next** paragraph, Judge  
 23 Cox made clear that “May’s actions were also **done in concert with and for the benefit of**  
 24 **respondents.**” *Id.* at 12 (emphasis added). Two sentence later, Judge Cox confirms that the  
 25 “actions” being referred to are the development of the Cheat Software holding that “May reverse  
 26

1 engineered *Destiny* 2 in order to help develop a cheat for *Destiny* 2 that Phoenix sold on its  
2 website.” *Id.*

That satisfies the second part of Bungie's requested instruction: that May developed the Cheat Software "**while working with and for the benefit of the other Defendants.**" *Id.* at 12.

Judge Cox made several other findings that support this position. For instance, he held that May “acted in concert with Phoenix [Digital] and its owners” on matters giving rise to the claims that are the subject of this proceeding.” *Id.* at 5. Judge Cox further found that May’s reverse engineering of *Destiny 2* “allowed Phoenix [Digital] to modify and sell through its website, AimJunkies.com, a beta version of a cheat for *Destiny 2*” and subsequent versions of the Cheat Software.” *Id.* at 6-7. And Judge Cox addressed and rejected Defendants’ argument that May was not an agent of Phoenix Digital, finding that “the evidence shows otherwise” because he “repeatedly attacked” Bungie’s defenses using “proprietary signature authority of Phoenix [Digital] to attain his objectives. *Id.* at 15; *see also id.* at 16 (“[T]he evidence also shows that [May breached the LSLA multiple times by reverse engineering *Destiny 2*] in concert with Phoenix [Digital] and its owners.”).

16 Judge Cox therefore found the specific facts supporting Bungie's request for issue  
17 preclusive effect of the finding that "May developed the Cheat Software sold on AimJunkies.com  
18 while working with and for the benefit of the other Defendants." Bungie requests that the Court  
19 grant its motion for reconsideration on this issue.

C. To operate, the Cheat Software necessarily creates (a) unauthorized copies of the Destiny 2 code and (b) unauthorized derivative works.

The Court also denied Bungie’s request to instruct the jury that, “in order to operate, the Cheat Software necessarily creates (a) unauthorized copies of the *Destiny 2* and *Destiny 2: Beyond Light* code and (b) unauthorized derivative works of *Destiny 2* and *Destiny 2: Beyond Light*,” holding that “any such finding was not necessary to the Arbitrator’s Final Award.” Dkt. No. 241.

1       But Judge Cox's finding that “[t]o operate, the cheats necessarily create unauthorized  
 2 copies of the *Destiny 2* code and unauthorized derivative works” was necessary to his finding of  
 3 Defendants liable under 17 U.S.C. § 1201(b). Final Award at 13; *see also* Dkt. No. 201 at 11  
 4 (holding that the Cheat Software and loader were found to be illegal at the arbitration and giving  
 5 Judge Cox's finding preclusive effect in this case). An element of a DMCA claim under this  
 6 section required that Bungie show any of the three following criteria:

- 7           • The Cheat Software “is primarily designed or produced for the purpose of  
                  circumventing a technological measure that **effectively protects a right of a**  
                  **copyright owner under this title** in a work or a portion thereof,”
- 8           • The Cheat Software “has only limited commercially significant purpose or use  
                  other than to circumvent a technological measure that **effectively protects a right**  
                  **of a copyright owner under this title** in a work or a portion thereof,” or
- 9           • The Cheat Software “is marketed by that person or another acting in concert with  
                  that person with that person’s knowledge for use in circumventing a technological  
                  measure that **effectively protects a right of a copyright owner under this title** in  
                  a work or a portion thereof.”

10      Final Award at 13; 17 U.S.C. § 1201(b)(1)(A)-(C).

11      Thus, it was necessary for Bungie to show, and Judge Cox to find, that the Cheat Software  
 12 circumvented technological measures that protect a **right** of Bungie under copyright law in *Destiny*  
 13 and *Destiny 2: Beyond Light*—i.e., the right to copy and/or the right to create derivative works.  
 14 *Id.*

15      Judge Cox found that Bungie proved that the Cheat Software circumvented Bungie’s  
 16 protections against unauthorized copying or creation of derivative works **because the Cheat**  
 17 **Software “necessarily create[s] unauthorized copies of the *Destiny 2* code and unauthorized**  
 18 **derivative works.”** Final Award at 13. This was a two step process.

1       First, Judge Cox held that “Bungie employs robust methods to protect [*Destiny 2*.]” *Id.* at  
 2 11. Then, Judge Cox needed to determine if Defendants circumvented those measures. Ultimately,  
 3 he found that Bungie had proven circumvention because, Defendants (and their software) **were**  
 4 **able to do what the measures protected against: copying code and making derivative works.**  
 5 *Id.* at 13.

6       In other words, Judge Cox found that because Bungie has measures in place to prevent  
 7 copying and creation of unauthorized derivative works, and because—**despite those**  
 8 **protections**—the Cheat Software and loader were still able to make copies and derivative works,  
 9 they necessarily must have circumvented the technological protection measures Bungie had in  
 10 place to prevent that. Thus were Defendants liable under 17 U.S.C. § 1201(b). *Id.* Without a  
 11 finding that the Cheat Software and loader copied code and made derivative works, there could be  
 12 no finding of circumvention in this case.

13       To be clear, that is not to say that circumvention cannot be proven in any other way.  
 14 However, **in this case**, the evidence showed the Cheat Software and loader operated by copying  
 15 the *Destiny 2* code and creating derivative works, and that factual finding was a **necessary** part of  
 16 Judge Cox’s holding.

17       Furthermore, Judge Cox’s reasoning is entirely consistent with how other courts have  
 18 found violations of 17 U.S.C. § 1201(b). *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 941  
 19 (N.D. Cal. 2009) is one such case. There, the court found a § 1201(b) violation because, after  
 20 using the defendant’s circumvention device, the result was “an unauthorized copy” of the  
 21 plaintiff’s copyrighted software. *Id.* In *Apple*, the court held that because the plaintiff had  
 22 protections in place to prevent accessing the copyrighted work, and because the defendants’  
 23 technology was still able to make copies of that work, there must have been circumvention. *Id.*  
 24 Judge Cox made the same finding in the arbitration: after using the Cheat Software, the result on  
 25 a cheater’s computer were unauthorized copies of *Destiny 2* and unauthorized derivative works.  
 26 Final Award at 13. This finding was thus **essential** for the Arbitrator’s finding of liability. Because

the other elements for issue preclusion are also met, this issue therefore must be given preclusive effect in this case.

### III. CONCLUSION

For these reasons, Bungie's Motion for Reconsideration should be granted.

I certify that this memorandum contains 2,098 words, in compliance with the Local Civil Rules.

Dated: November 16, 2023

By: s/ William C. Rava

William C. Rava, Bar No. 29948  
Christian W. Marcelo, Bar No. 51193  
Jacob P. Dini, Bar No. 54115  
**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Telephone: +1.206.359.8000  
Facsimile: +1.206.359.9000  
[WRava@perkinscoie.com](mailto:WRava@perkinscoie.com)  
[CMarcelo@perkinscoie.com](mailto:CMarcelo@perkinscoie.com)  
[JDini@perkinscoie.com](mailto:JDini@perkinscoie.com)

*Attorneys for Plaintiff Bungie, Inc..*

BUNGIE, INC.'S MOTION  
FOR RECONSIDERATION – 7  
(No. 2:21-cv-00811)

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: +1.206.359.8000  
Fax: +1.206.359.9000